SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM 1967

No. 10,685

TI TI PEAT HUMUS COMPANY, INC.,
a corporation,

Petitioner

versus

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court is reported in 249 F. Supp. 166 and is printed in Appendix A hereto. The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 373 F. 2d 209 (Advance Sheet #2) and is printed in Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 6, 1967. A Petition for Rehearing was filed and thereafter denied by Order of the United States Court of Appeals for the Fourth Circuit on March 10, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. § 1254.

QUESTION PRESENTED

The sole question for decision in this litigation is whether one engaged in the harvesting of peat humus (a term used interchangeably with peat moss) is covered by the provisions of the Fair Labor Standards Act which exempt any employee employed in "agriculture" from its operation and likewise exempts "any individual employed within the area of production (as defined by the Secretary) engaged in . . . preparing . . . agricultural . . . commodities for market . . .".

STATUTES

The statutes involved are the following provisions of the Fair Labor Standards Act, viz., 29 U.S.C.A. § 203(f) and § 213(a)(6)(10). These provisions are set out in their entirety in Appendix C.

STATEMENT

The Petitioner, a South Carolina corporation, harvests, processes and sells in interstate commerce, peat humus from a tract of land located in a remote area of Colleton County, South Carolina, 25 to 30 miles from Walterboro, the closest incorporated town, whose population is 5,417 by the 1960 census. Its 6 employees were generally engaged in the harvesting of peat humus and in selling and distributing the same to points within and without South Carolina. Contending that its operations were exempt under the provisions of the Fair Labor Standards Act, the Petitioner failed to pay its employees in accordance with the minimum wage and overtime provisions of that Act, and for that reason the Respondent here instituted an action in the United States District Court for South Carolina seeking to enjoin future alleged violations of the Act. The case was tried in the District Court without a jury, and the Court below, on the basis of the evidence

presented there, found as facts: (1) that peat humus was an agricultural commodity within the meaning of the Fair Labor Standards Act; and (2) that the employees of the Petitioner were individuals employed within the area of production (as defined by the Secretary) and were engaged in handling, preparing in their natural state, agricultural commodities for market. On that basis it dismissed the Respondent's Complaint.

The Respondent appealed to the United States Court of Appeals for the Fourth Circuit where the holding of the District Court below was reversed and judgment rendered in favor of the Respondent. The Court of Appeals did not reverse on the ground that the finding of fact that peat humus was an agricultural commodity within the meaning of the Fair Labor Standards Act was clearly erroneous, but reversed on the theory that the legislative history, the administrative interpretation of the Act by the Secretary of Labor, and subsequent Congressional and administrative treatment of the Act in general, established a legislative intent that the harvesting of peat was not the harvesting of an agricultural product within the meaning of the exemptions granted by the Fair Labor Standards Act.

REASONS FOR GRANTING THE WRIT

It seems clear that if the harvesting of peat humus is "agriculture" as that term is defined, the decision of the Court of Appeals was erroneous and should be reversed. On the other hand, if the Congressional intent can be established that the harvesting of peat humus was not an element of agriculture within the definition of the Act, then the Court of Appeals' decision is correct.

Two facts stand out. In the first place, the exemption includes those engaged in "the harvesting of agricultural com-

modities," and in the second place, the Congress did not attempt to set out in haec verbis all items which fall into the category of agricultural commodities.

The Petitioner does not argue that the activity is one related to agriculture, and on that basis affords the exemption. Compare *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755 (1949), and *McComb v. Super-A Fertilizer Works*, 165 F. 2d 824 (1948). Its sole contention is that peat humus is itself an agricultural commodity and on that basis its harvesting automatically brings about the exemption provided in the Fair Labor Standards Act.

A similar problem faced the three-judge court in the case of *Premier Peat Moss Corporation v. United States*, 147 F. Supp. 169 (affirmed by this Court 355 U. S. 13, 78 S. Ct. 16). Called upon to determine, for the purpose of the Interstate Commerce Act, whether peat humus was "an agricultural commodity" within the meaning of 49 U.S.C.A. § 303(b)(6), the Court undertook to resolve the question of fact whether peat humus was an agricultural commodity. The Court found that it was.

The District Court in this case adopted a similar approach, and notwithstanding the reversal, the Court of Appeals did not conclude that its finding of fact was "clearly erroneous."

Instead, the Court of Appeals relied first of all on the interpretation given by the Secretary of Labor, who in 1940 granted an exemption to northern peat marketers because their industry was seasonal. Concededly, the interpretation of the Secretary might be persuasive, but it cannot control in a court of law where an issue of fact controls the result of the case.

References by the Court of Appeals to "the legislative history" and "subsequent Congressional and administrative treat-

ment of the Act in general" find no support in the records of Congress. On the contrary, Congress must be presumed to have knowledge of the decision of the three-judge court in the case of *Premier Peat Moss v. United States* and of the action of this Court in 1957 in affirming that decision. Yet notwithstanding, when on two subsequent occasions (prior to this litigation) Congress did deal with this statute, including specifically § 213(a)(10), it made no effort to amend the law to declare that the harvesting of peat humus was not the harvesting of an agricultural commodity. Extensive amendments to the Fair Labor Standards Act were enacted by the Congress in both 1960 and 1961, but despite obvious knowledge of the action of this Court in affirming the three-judge court in the *Premier Peat Moss Corporation* case, Congress left the Fair Labor Standards Act alone as far as this question is concerned.

Hence not only is the Congressional treatment of the Act in general completely silent insofar as the harvesting of peat humus is concerned, but that silence, coupled with the Congressional knowledge of the decision of this Court in the *Premier Peat Moss Corporation* case, can only be construed as Congressional approval that the harvesting of peat humus was "agriculture" within the definition in the Fair Labor Standards Act.

CONCLUSION

To sum up, on the basis of a judicial finding in this litigation, peat humus has been found to be an agricultural commodity. Absent reversal on the ground that such finding is clearly erroneous, it must control the decision. The activity engaged in was the harvesting of peat humus. The exemption extends to those who harvest agricultural commodities. Hence, the exemption is available to the Petitioner, and the Writ sought should be issued.

Respectfully submitted,

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APPENDIX A

ORDER OF DISTRICT COURT

Plaintiff instituted this action to enjoin defendant from violating the provisions of Section 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. § 201, *et seq.*, hereinafter referred to as the Act. The court has jurisdiction pursuant to Section 17 of the Act.

In his complaint plaintiff alleges that defendant has heretofore employed and is now employing approximately six employees in and about its place of business at a locality known as Green Pond in Colleton County, South Carolina, in mining, pulverizing, processing, and otherwise working on, and bagging peat humus; and in selling and distributing the same to points outside the State of South Carolina; and that said employees are engaged in commerce and in the production of goods for commerce within the meaning of the Act. Plaintiff further alleges that during the period since June 26, 1960 defendant has violated, and is violating, Sections 7 and 15(a)(2), the overtime provisions of the Act; and that during the period since June 26, 1960, defendant has violated Sections 6 and 15(a)(2), the minimum wage provisions of the Act. Plaintiff seeks to enjoin such alleged violations under Section 17 of the Act. In its answer defendant admits generally the allegations of the complaint, but denies that plaintiff should be granted an injunction. Defendant also sets up the affirmative defense that its said employees are exempted from the foregoing sections of the Act, under either or both of the exemptions afforded by the agricultural exemption [Section 13(a)(6)]; or the area of production exemption [Section 13(a)(10)]. Defendant also asserted the affirmative defense based upon the forestry exemption provided in Section 13(a)(15) of the Act, which was voluntarily abandoned at the trial.

At the commencement of the trial, defendant by stipulation conceded that it had not paid its employees in accordance with the minimum wage and overtime provisions of the Act, and rested its defense upon its affirmative defenses that it was exempted from the Act's coverage. Thus the sole issues to be determined by the court are: (1) Whether defendant's employees are exempted from the coverage of the Act; and (2) if not, should injunction be granted restraining defendant from further violation of the Act.

The case was tried before me without a jury on July 12, 1965 at Charleston, South Carolina. In compliance with Rule 52(a) Federal Rules of Civil Procedure, I find the facts specially and state my conclusions of law thereon.

FINDINGS OF FACT

1) Defendant is a South Carolina Corporation, organized during 1955 with its principal and only place of business near Green Pond, Colleton County, South Carolina, within the jurisdiction of this court. For some time prior to September 3, 1961, and during the period since that date employees of the defendant have been and are now engaged in commerce, or the production of goods for commerce, within the Act. Since September 3, 1961, its employees have been paid by defendant at hourly rates less than the minimum wages required by the Act; and were compensated for their overtime hours [the hours by which their employment exceeded 40 hours per workweek] at the rate of one and one-half times such subminimum rates, in violation of the overtime provisions of the Act. The defendant regularly ships goods produced by its employees to points outside the State of South Carolina.

2) About the year 1945 C. T. Cummings, who is now President of defendant, acquired approximately 3,500 acres known as Creighton Hill Plantation in Colleton County. Some-

time later it was determined that a portion of this acreage contained valuable peat or peat humus in sufficient quantities that such could be commercially harvested and sold. Mr. Cummings, after the formation of defendant corporation, leased 2,000 acres of his tract to it, and the lease has recently been extended for an additional ten-year period.

3) During the past ten years the peat has been gathered and harvested from a portion of the tract by the use of spring tooth harrows, rotor tillers, frontend loaders, and farm tractors. Prior to gathering of the peat, the tract was generally covered with trees, brush, and various species of weeds and grasses. Most of the area was damp, low lying land covered with surface waters. Prior to the harvesting operation, it was necessary to drain the area and clear the lands of all growth and vegetation. Defendant constructed roadways, a railroad siding, drainage ditches, and a processing and packaging plant.

4) During the past several years defendant's operations have been hampered by excessive rainfall, which has caused several interruptions and difficulties. It has not proved to be a profitable venture, as none of its ten stockholders has received any dividends in the history of the company, and no officer of the company has been paid a salary. Mr. Cummings, as lessor, has not received rent or compensation for the lease of his peat bearing lands as provided for in his lease with defendant.

5) No seasonal crops are planted or cultivated on any portion of the 2,000 acres leased by defendant from Mr. Cummings, and it produces or deals in no other commodity or product other than peat. Neither has it during the period of the operation planted or cultivated any growing plants such as mosses, reeds and sedges from which the peat deposits were formed and accumulated.

6) The plant site is in a remote area of Colleton County, twenty-five to thirty miles from Walterboro, the closest incorporated town, whose population is 5,417 by the 1960 census. This meets the Area of Production requirements in the exemption provision [Section 13(a)(10)] of the Act for agricultural and horticultural commodities as defined by the Secretary. [29 C.F.R. 532.2].

7) In fiscal year 1964 net sales by defendant amounted to just under $79,730.40. Labor costs for a plant or bog manager and for field and plant employees amounted to $29,247.67 for this period. Through the testimony of Mr. Cummings, its President, defendant has assured the court that, in the event its employees are found not to be exempt from the Act it will either comply fully with the provisions of the Act in its future operations, or it will go out of business completely. It asserted its financial inability to make any back payments found due to its employees.

8) The peat or peat humus is gathered by defendant from an area described as a wet meadow or a bog, which is in general waterlogged, wet and full of moisture, and must be drained and cleared of underbrush and all growing vegetation before any harvesting of peat is commenced. After the bog has been adequately drained and cleared, the peat is then ready for harvesting or gathering. This is acomplished by plowing the bog or field with spring tooth harrows and rotor tillers to loosen and till the peat so that it can be air-dryed and loaded by a frontend loader onto tractor-drawn dump carts; then it is carried to the plant to be screened for roots, and then bagged or loaded into trucks for bulk shipment. Other than screening out the roots, no further processing or treatment is required, nor is it necessary to add any substance to the peat.

9) Defendant's deposit of peat covering approximately 40 acres is composed of decaying and decayed plants such as reeds, sedges, red root, baze, southern smilax, pine, pine straw, bay and laurel trees, and many other botanical specimens including various types of mosses, some of which have apparently been recently growing, and others which have been decayed, accumulated, and preserved in the waterlogged area over a period of several hundred years. Reeds, mosses, and sedges are the principal and dominant reproducing vegetation in the Ti Ti bog, and their roots contribute to the total organic matter. This material is accumulated in waterlogged areas down to a depth of 16 feet in some places, and is subject to very slow decomposition under water. As a general rule there will be living matter growing on top of the bog, and immediately below that the decayed matter which has been alive a short time previously. The peat is laid down annually, the bottom level being the older strata and the top strata being only a few years old. The peat has living organisms in it such as bacteria and fungi.

10) The chemical properties of the peat in question do not vary according to the depth at which the peat may be found, since defendant's is a uniform bog; and analyses made over a period of ten years show the same to be about 97% vegetable organic matter, and about 3% mineral ash, the latter being principally a siliceous substance commonly known as inert sand.

11) The chief uses of peat in agricultural and horticultural pursuits is in soil conditioning, since it gives lightness to a heavy soil, and waterholding capacities to light, sandy soil. The use of peat also stimulates plant growth and the rooting of plants, the development and growth of leaves and leaf color; and is used extensively as potting material for plants

in greenhouses, and as protection for plants and flowers in shipment.

12) Defendant's peat deposit was undoubtedly formed entirely from vegetation and its progressive decomposition through the years, in a saturated natural environment such as a bog, stagnant pond, marsh, or the like. It is in such surroundings that the mosses, reeds and sedges propagate and grow in masses and form peat humus. The accumulation is marked by two characteristics: First, because of the saturated conditions in which such plants grow, and to some extent because of the absorbent qualities of the plant material, water-covers and thereby affects the rate of decomposition of the plants. The water in these saturated surroundings cuts off oxygen and prevents total oxidation or decomposition. Secondly, such plants have hyaline cells which absorb water, thus aiding in the prevention of total oxidation or decomposition. The accumulation of these plants in such saturated environment, which is very slow to oxidize or decompose as above described, grows and develops at an estimated rate of about one foot per five hundred years. Naturally, in the accumulation of such mosses, sedges and reeds under such environment giving rise to peat humus, other type plants than those enumerated which form the peat also become a part of the accumulation in limited numbers and species. Since defendant's deposit extends to depths down to sixteen feet, it is evident that it has been many centuries in growth and development.

13) Although not controlling of the issues in this case, it is interesting to note that defendant's activity under South Carolina Law has been classified as a farming operation and has been exempted from the South Carolina sales and use tax. Further, interstate truck transportation of peat has been exempted as an agricultural and horticultural commodity under the provisions of the Interstate Commerce Act, [49 U.S.C.A.

303(b)(6)], by a three judge court in the Southern District of New York in *Premier Peat Moss Corporation v. United States*, 147 F. Supp. 169, aff'd. 355 U.S. 13. The effect of this decision has created keen competition for defendant and other peat producers in this area from imported peat and from northern markets which enjoy the benefits from "back haul" freight rates from produce truckers in the large industrial areas, while defendant is not so located geographically that it can obtain the bargain "back haul" rates, and is thus being undersold by its competitors.

14) Defendant presented two well qualified experts at the trial, Dr. Rouse S. Farnham, an Ohio State University Ph.D. graduate in soil science [formation of soils] who worked for several years with the Soil Conservation Service of the federal government; and Dr. T. L. Senn, Ph.D., head of Department of Horticulture at Clemson University. Both of these witnesses expressed their opinion that peat and peat humus were agricultural or horticultural commodities.

15) Plaintiff's expert who testified in reply was Dr. S. L. Doerbinghaus, Associate Professor of Biology at Agnes Scott College in Atlanta, Georgia, who majored in chemistry and genetics. In his opinion peat is not an agricultural or horticultural commodity, but is a substance which fits into a mineral sequence in the broad sense, such as coal or lignite. Clifton L. Holmes, a research economist of the Wage-Hour Division of the Department of Labor testified that he had done considerable research and study concerning peat moss and peat production for his Department, and had compiled documentary evidence to substantiate plaintiff's position.[1] Holmes

[1]The summary of Holmes' research which was objected to by defendant was permitted to be tendered for the record under Rule 43(c) of Federal Rules of Civil Procedure. Although I ruled that such was inadmissible I have considered it in my study and determination of the issues of the case.

also opined that peat was not an agricultural or horticultural commodity.

16) The court is thus confronted with the usual dilemma resulting from the contradictory and unreconcilable testimony and opinions based thereon of the "so-called" experts of opposing parties. However, after a careful study of the testimony and the relevant evidence before the court which has been briefly set forth hereinabove, I find and conclude that peat and peat humus are in fact agricultural or horticultural commodities within the meaning of the Act.

17) Prior to the effective date of the 1961 amendments to the Act, which increased the minimum wage, defendant was in compliance with provisions of the Act relating to wages, as an investigation of defendant during the year 1958 disclosed only one violation of the recordkeeping provision of the Act as to one employee only.

Following the passage of the 1961 amendment, defendant began to make inquiries about the effect upon its operation of the *Premier Peat Moss* decision, *supra,* because it felt it could not pay the increased wages and continue its operations. Defendant was again examined during 1962 by a Mr. Bolen, representative of plaintiff, who stated that he agreed with defendant's interpretation that peat was an agricultural product, but that he was bound by the Administrator's interpretation to the contrary. At that time, the investigators indicated that the question could best be resolved by a judicial determination. Under such circumstances, and upon advice of counsel, defendant continued to claim that its operation was exempted from the Act. This suit was instituted shortly thereafter in early January 1963 by plaintiff.

18) Under all the attendant circumstances, I find that defendant has acted throughout in complete good faith, and that its failure to comply with the Act was justified. There

existed a bona fide dispute upon which fairminded persons could disagree and reach different conclusions. Defendant's officers have assured the court of its full compliance with the Act should it be determined herein that it is not entitled to the claimed exemption; and the court is thoroughly convinced that such will be the case.

CONCLUSIONS OF LAW

1) The court has jurisdiction of the parties and subject matter of this action. 29 U.S.C.A. 217.

2) Section 3(f) of the Act [29 U.S.C.A. § 203(f)] defines agriculture to include "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities [including commodities defined as agricultural commodities in Section 1141j(g) of Title 12], the raising of livestock, bees, fur-bearing animals, or poultry, and any practices [including any forestry or lumbering operations] performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

3-a) The exemptions within which defendant claims its operation comes are incorporated in Section 13(6) and 13(10) respectively in the Act [29 U.S.C.A. § 213(a)(6) and 213(a)(10)] as follows:

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to— . . .

> "(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which

are used exclusively for supply and storing of water for agricultural purposes; or . . .

"(10) any individual employed with the area of production [as defined by the Secretary], engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or . . . ."

3-b) The area of production is defined by the Secretary in regulations set forth in 29 C.F.R. § 536.2 as follows:

"(a) An individual shall be regarded as employed within the 'area of production' within the meaning of section 13(a)(10 [29 U.S.C.A. 213(a)(10)] of the Fair Labor Standards Act . . . . .:

"(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following airline distances from the establishment: . . . . .

"(ii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subparagraph — 20 miles; . . .

"(b) For the purposes of this section:

"(1) 'Open country or rural community' shall not include any city, town, or urban place of 2,500 or greater population, or any area within:

"(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or . . . "[2]

4) The Fair Labor Standards Act is social legislation to be liberally construed so as to effect broad coverage. It is well settled that in establishing an exemption of its employees from the coverage of Section 213 of Title 29, an employer asserting such exemption has the burden of proving "plainly and unmistakenly" that its employees are exempt, and the provisions of the exemption sections are to be narrowly construed against exemptions. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 [1960]; *Walling v. General Industries Co.*, 330 U.S. 545 [1947]; *Pugh v. Lindsay*, 206 F. 2d 43 [4th Cir. 1953].

5) Defendant's deposit of peat is of vegetable origin and has been shown by chemical analyses over the last several years to contain about 97 percent vegetable organic material. The determination as to whether defendant's peat is an agricultural or a horticultural commodity resolves upon mixed questions of law and fact, and must be determined upon consideration of all relevant circumstances. From the court's factual determinations, with particular emphasis upon the

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[2]The design of Congress in adopting these exemptions is expressed by the United States Supreme Court in *Mitchell, Secretary of Labor v. Budd, et al.*, 350 U.S. 473 [1956] at page 478 as follows:

"The aim of Congress was to exempt employees 'employed in agriculture,' § 13(a)(6), and those engaged in agricultural enterprises in the 'area of production,' § 13(a)(10). That meant drawing a line between agricultural enterprises operating under rural-agricultural conditions and those subject to urban-industrial conditions. An individual working in an agricultural packing plant on the edge of Los Angeles is in a strikingly different environment from one doing the same work in a small town in the heart of Kansas. Nearness to a large city has relation to the problem of the Administrator in making his definition. For the proximity of the plant to a metropolitan center, like the size of the town where the plant is located, may make the decisive difference between an agricultural and an urban environment. Likewise, nearness of the plant to its supplies cannot be considered an irrelevancy. For 'area' is understandable in terms of nearness and farness. Distance is an important factor in any formula which seeks to treat more or less as a unity labor on farms and labor in agricultural enterprises in the 'area of production.'"

origin of the peat and defendant's manner of harvesting the same, and from my interpretation of the pertinent provisions of the Act, I conclude that defendant's employees are "employed in agriculture" as defined by Section 3(f) of the Act, *supra*, and are exempted from coverage under the Act pursuant to Sections 13(6) and 13(10) of the Act, *supra*. Although the case of *Premier Peat Moss Company v. United States, supra*, deals with an exception under Section 303(b)(6) of Title 49 U.S.C.A. [Interstate Commerce Act] I have found such opinion to be the most persuasive judicial determination in assisting the court in deciding the primary issue in the instant case. In *Premier* the question before the court was whether the Interstate Commerce Commission was correct in ruling that peat moss is not an "agricultural" commodity within said Section 303(b)(6).[3] Although a different federal act was involved in that case the issues and contentions of the parties were primarily the same as in our case, and the evidence adduced there was strikingly similar to that here. Likewise the Congressional intent for such exemption under Interstate Commerce Act was closely akin to the purpose for granting agricultural exemption under Fair Labor Standards Act to benefit the farmer.[4] In reversing the Commission's determination that peat was not an agricultural commodity so as to be exempted under the agricultural exemption and finding that peat was exempted as an "agricultural commodity" the court, at page 174, stated:

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[3]49 U.S.C.A. Section 303(b) declares: "Nothing in this chapter . . . shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish [including shellfish], or agricultural [including horticultural] commodities, . . ."

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[4]See *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49 [1956] wherein the Supreme Court states: "The exemption of motor vehicles carrying 'agricultural [including horticultural] commodities [not including manufactured products thereof]' was designed to preserve for the farmers the advantage of low-cost motor transportation."
See also note 2, *supra*.

"Indubitably peat moss is of vegetable origin. It is produced by nature from what was once vegetation, and chemically it is substantially the same as the vegetation from whence it is derived. In fact, its chief characteristic results from the fact that nature itself has arrested any substantial change which without the protection of water would otherwise have taken place. Its principal uses, too, are either agricultural or horticultural'.

"The defendants urge that peat moss is unlike any commodity produced on a farm and is more in the nature of coal. But in the case of coal, although in origin derived from vegetation, the processes of nature have converted it into a mineral. Not so in the case of peat moss. There the processes of decay have not progressed far enough to cause any substantial change in its original chemical content."

It is interesting to note that Premier Peat Moss Company's contention that peat moss was an agricultural commodity was supported by the Secretary of Agriculture who filed a brief without formally intervening. It would indeed be anomalous and quite confusing, to say the least, for the court to determine that peat at its source is not an agricultural or horticultural commodity, but that while being subsequently transported in interstate commerce it then became an agricultural or horticultural commodity.

6) In an unreported decision by District Judge Bascom S. Deaver of the Middle District of Georgia dated May 21, 1943 in *Walling v. Georgia Peat Moss Company*, wherein the issues were somewhat similar to those in this case, the court held that "the exemptions claimed are not applicable in the business carried on by defendant". A copy of the record in the *Georgia Peat Moss* case, including the complaint, answer, findings and conclusions, was furnished to the court and has

been carefully considered. There appear to be considerable factual distinctions between that case and the case at bar. In addition, the opinion of Judge Deaver indicates that Defendant therein was forced to trial at the instance of the Administrator, in the absence of its operators who had been inducted into the Armed Forces, and the plant had been closed for some time. Under such circumstances I am unable to accord much weight or authority to that decision. It was sorely lacking in the strenuous adversary tactics generally found in contested cases, and at time of hearing had apparently taken on the attributes of a moot issue.

7) I am unable to agree with plaintiff and his expert witnesses in their contention that peat is a mineral in the broad sense, such as coal or lignite. See *United States v. Toole*, 224 F. Supp. 440 [Mont. 1963]. It has undergone no substantial metamorphis or change in its original chemical content.

8) Inasmuch as I have concluded that defendant's peat is an agricultural or horticultural commodity, and that its employees engaged in the gathering, harvesting and processing such commodity for shipment in interstate commerce are exempt under the provisions of the Act, plaintiff's complaint should be dismissed. However, for the purposes of the record I hold and conclude that even if defendant's said employees were not exempt from the coverage of the Act, and that defendant was in violation of the minimum wage and overtime provisions thereof, I would refuse to issue an injunction under the facts and circumstances of this case, especially in view of the representations and assurances of defendant's managing officers that the defendant will fully comply with all of the provisions of the Act in its future operations should the court determine that its employees were not exempt from the provisions of the Act. The court is well aware that every violation of the Act does not necessarily require the issuance of an

injunction, which is a drastic remedy, not to be invoked as a punitive measure but only to be used to insure future compliance with the law, as was so clearly stated by the Fourth Circuit in *Walling v. Clinchfield Coal Corporation*, 159 F. 2d 395 [1946]:

> "There can be no question but that the usual equity rules applicable to injunctions are to be regarded in considering an application for that remedy under the Act [Fair Labor Standards Act]. Fleming v. Phipps, D.C., 35 F. Supp. 627. For, as was said in Walling v. Associated Truck Lines, D.C., 57 F. Supp. 943, 945: 'The rule is well settled that the extraordinary writ of injunction will not issue for the purpose of punishing past offenses, but *will issue only in those cases where the court is convinced that such relief is necessary to prevent future violations.*'" [Emphasis added].

Plaintiff has failed to convince the court that the defendant has acted at any time in bad faith or in such a wilful manner as to warrant the application of drastic sanctions against it. There was ample ground for an honest difference of opinion in the interpretation of the provisions of the Act as construed by plaintiff and the factual circumstances of this case.

In accordance with the foregoing findings of fact and conclusions of law, it is

ORDERED that plaintiff's complaint be dismissed, and that his prayer for injunctive relief be, and the same is hereby, denied.

s/Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Charleston, S. C.
January 14th, 1966.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Boreman, Circuit Judge:

The Secretary of Labor seeks, under section 17 of the Fair Labor Standards Act (hereinafter Act), to enjoin the defendant, Ti Ti Peat Humus Company, Inc., from future violations of the minimum wage, maximum hours, overtime, and record-keeping requirements of the Act. The defendant contends that it is excused from complying with these provisions of the Act by virtue of the agricultural exemption hereinafter noted. The District Court, in a trial without a jury, held that peat humus (the term apparently being used interchangeably with "peat moss") is an agricultural commodity within the meaning of the exemption provision of the Act and denied the Secretary's request for in injunction.[1] The Secretary appeals and we reverse the decision below.

The defendant (hereafter "company") is a South Carolina corporation with its sole and principal place of business near Green Pond, Colleton County, South Carolina. Since 1956, the company has been actively engaged in extracting, processing, packing and selling peat humus and shipping it in interstate commerce. The peat deposit is located on forty acres of a 2,000-acre tract of land which the company leases from its president. The company has six employees who are employed on a full-time basis except when interruption of operations is occasionally necessitated by adverse weather conditions.

In 1961 the company, because its enterprise was proving unprofitable, decided that it would be unable to pay its employees the minimum rates established by a then recent amend-

[1] Wirtz v. Ti Ti Peat Humus Company, 249 F. Supp. 166 (D.C. S.C. 1966).

ment to the Act. It then began and continued to pay wages at rates less than those prescribed for both a regular forty-hour week and for overtime in excess of forty hours. In 1963 the Secretary instituted proceedings to enjoin future violations. The District Court, after hearing conflicting testimony of four experts, two of whom expressed the opinion that peat was an agricultural commodity and the other two expressing a contrary opinion, decided that peat was an "agricultural commodity" and that the business of harvesting and marketing the peat was exempt from the minimum wage overtime and record-keeping requirements of the Act.

The Secretary urges that the legislative history, the administrative interpretation and subsequent congressional and administrative treatment of the Act in general and the agricultural exemption in particular indicate that Congress did not intend that the peat industry or those engaged therein should come within the exemption. Section 13 of the Act provides:

> "(a) The provisions of Section 6 and 7 [minimum wage and maximum hours sections] shall not apply with respect to * * * (6) any employee employed in agriculture * * * or (10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, * * *." 52 Stat. 1067, 29 U.S.C. § 213(a)(6), (10).

"Agriculture" as defined by section 3(f) of the Act "includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as

agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." 52 Stat. 1060, 29 U.S.C. § 203(f).

Clearly, the company is not engaged in what is known as the "secondary meaning" of "agriculture" since the operation is not done by a farmer or on a farm.[2] If the exemption is to apply the company must prove that it comes within the "primary meaning" of agriculture which includes "among other things, the cultivation and tillage of the soil * * * the production, cultivation, growing and harvesting of agricultural commodities * * *." The question is thus reduced to a determination of whether the company's employees are engaged in any of these activities.

The method of operation here followed is not complex. These peat deposits are found in a watery or marshy area or bog of some 40 acres located on the leased 2,000-acre tract. The court below found that the deposits are "composed of decaying and decayed plants such as reeds, sedges, red root, baze, southern smilax, pine, pine straw, bay and laurel trees, and many other botanical specimens including various types of mosses, some of which have apparently been recently growing, and others which have been decayed, accumulated and preserved in the waterlogged area over a period of several hundred years."[3] The court further found that the chemical property of the peat was 97% vegetable and organic matter

[2] Farmers Reservoir and Irrig. Co. v. McComb, 337 U.S. 755, 765 (1948), pointed out this distinction in section 3.

[3] 249 F.Supp. at 169.

and 3% mineral ash; that the company plants no seasonal crops, nor does it cultivate any portion of the leased 2,000 acres or produce or deal in any product or commodity other than peat; that the company had not planted or cultivated any growing plants which would contribute to the accumulated vegetation in the bog.

We next consider the question as to whether the company's operation might come within the *production* of agricultural commodities provision of the Act. The method of collecting and preparing the peat for market is a rather rudimentary operation. The land is drained, cleared of trees and other growth and the peat is taken from the surface by means of various mechanical implements such as harrows, tillers, front-end loaders and tractors. The peat is then transported to the company's nearby plant, screened and bagged or loaded onto trucks for bulk shipment.

Peat is used primarily as a soil conditioner, and only secondarily as a fertilizer since it possesses some qualities tending to stimulate plant growth. At face it might appear that this operation under consideration amounts to "production" of an agricultural commodity within the meaning of the Act but the Secretary cogently argues that the term "production" has a very special and limited application to the production of turpentine and gum rosins. In fact, the Secretary's contention is supported by *Farmers Reservoir & Irrig. Co. v. McComb.*[4] The Supreme Court, in holding that a corporation which collected water and furnished it to farmers did not qualify for an agricultural exemption, stated that the "production" provision of the Act was added "to take care of a special situation —the production of turpentine and gum rosins by a process involving the tapping of live trees."[5]

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[4] 337 U. S. 755 (1949); see McComb v. Super-A Fertilizer Works, 165 F.2d 824 (1 Cir. 1948), and H.R. Rep. No. 2738, 75th Cong., 3d Sess. 29.

[5] 337 U. S. at 765.

The administrative treatment of peat indicates that it is not an agricultural commodity. In 1943 the Administrator of the Wage and Hour Division declared that the term "agricultural and horticultural commodities" means "commodities which are planted and cultivated by man," and "since peat is not such a commodity the exemption does not apply to employees engaged in extracting, processing and distributing peat moss."[6]

The Secretary points out that as early as 1940 northern peat marketers applied for, and were granted an exemption from the Act under section 7(b)(3) which exempts certain "seasonal industries." They were unable to operate during winter months. Defendant, because of its geographic location, is not eligible for the "seasonal industry" exemption granted to the northern peat companies.[7] But the fact that such an exemption was sought is strong evidence indicating that neither Congress nor the peat industry considered the agricultural exemption applicable.

In a previous decision under the Act here being considered, *Walling* v. *Georgia Peat Moss Co.*,[8] it was held that peat was not an "agricultural commodity." The court below held that because of extraordinary circumstances in *Walling*, including the lack of strenuous adversary tactics therein, it could not accord this decision persuasive weight. The court relied, instead, on *Premier Peat Moss Corp.* v. *United States*,[9] holding that peat moss is an agricultural commodity within the meaning of the agricultural exemption of the *Interstate Commerce Act*. 49 U.S.C. § 303(b). The *Premier* decision appears to be based on the fact that peat is primarily vegetable in compo-

[6] C.C.H. Labor Law Reporter, Wages-Hours, ¶ 25,243.73.

[7] 5 F.R. 4916 (Dec. 6, 1940).

[8] 7 Lab. Cas. ¶ 61,622 (M.D. Ga. 1943).

[9] 147 F.Supp. 169 (S.D. N.Y. 1956) *aff'd.* 355 U.S. 13 (1957).

sition and this reasoning obviously influenced or dictated the lower court's disposition of the instant case.

The Secretary points out that in 1949, upon the amendment of the Fair Labor Standards Act, Congress, with full knowledge of the administrative construction and application of the Act as to peat moss stated that any existing "order, regulation or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor * * * shall remain in effect * * * except to the extent that [it] may be inconsistent with the provisions of this Act." 63 Stat. 910, 29 U.S.C. § 208. It certainly appears, as the Secretary urges, that Congress by employing this language with full knowledge of the Secretary's treatment of peat moss, intended that peat should not fall within the agricultural exemption.

The holding in *Premier Peat Moss*, 147 F. Supp. 169, *supra*, is certainly not controlling in this situation, nor do we find it persuasive authority. The Interstate Commerce Act was not drafted to meet the problems which confronted the authors of the Fair Labor Standards Act. The purpose of the latter was to correct and eliminate conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * *." 52 Stat. 1060, 29 U.S.C. § 202(a); *Brooklyn Savings Bank* v. *O'Neil*.[10] Remedial social legislation of this nature is to be construed liberally in favor of the workers whom it was designed to protect, and any exemption from its terms must be narrowly construed. *Phillips Co.* v. *Walling*.[11] The stated purpose of the Interstate Commerce Act is to provide for fair and impartial regulation of all modes of transportation * * * to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation among

[10] 324 U. S. 697 (1945).

[11] 324 U. S. 490, 493 (1945).

the several carriers * * *." 54 Stat. 899. While the Interstate Commerce Act states that fair wages and equitable working conditions are to be encouraged, it takes no steps to implement this expression of hope and it appears that this is, at most, a statement of a secondary purpose.

Finally, if the stated policy of the Act here involved, its legislative history and subsequent legislative and administrative treatment are not convincing we look to judicial pronouncements in cases which are not without pertinency. In *Farmers Reservoir & Irrig. Co.* v. *McComb*,[12] the Supreme Court held that employees who worked for a farmer cooperative corporation which collected water and supplied it to the member farmers for irrigation purposes, were not engaged in agriculture within the meaning of section 13(f) of the Act. The Court noted that as an economy becomes more sophisticated a division of labor follows and that what once was considered farming or agriculture is no longer so. The Court, taking note of the tremendous technological advances in the field of agriculture, remarked that

> "the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity."[13]

In applying this test to the instant case we are fully cognizant of the relationship of peat to agriculture but the conduct of defendant's business is independent of any agricultural activity or farming and we find in these circumstances support

[12] 337 U.S. 755 (1949).

[13] 337 U.S. at 761.

for our ultimate conclusion that there is no entitlement here to the agricultural exemption.

Similarly, in *McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824, *supra*, the First Circuit held that employees who manufactured and packed a chemical fertilizer used in agriculture were not engaged in agriculture within the meaning of section 13(f) of the Act. This decision was expressly approved by the Supreme Court in *Farmers Reservoir, supra*, 337 U.S. 755. After announcing the above-quoted test, Chief Justice Vinson said

> "The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions not agriculture."[14]

While peat is primarily a soil conditioner and not a fertilizer, and while it is harvested and collected rather than manufactured, the rationale of these cases is persuasive, particularly so when considered in conjunction with the stated policy of the Act, the legislative history and the subsequent administrative and congressional treatment.

Therefore, we hold that the company is not entitled to the benefit of the claimed exemption and must comply with the minimum wage, overtime and record-keeping requirements of the Act. Although the company has assured the trial court

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[14]337 U.S. at 761-62.

and this court that, in the event it is ultimately determined that the agricultural exemption is inapplicable, the company will comply with the Act or cease doing business, it would be unreasonable to direct the court below to retain the case on its docket pending reports as to company compliance. We remand with the direction to the District Court to enter an appropriate injunction order.

Reversed and Remanded.

APPENDIX C
STATUTES

29 U.S.C.A. § 203

Definitions

As used in this chapter–

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C.A. § 213

Exemptions

(a) The provisions of sections 206 and 207 of this title shall not apply with respect to–

(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(10) any individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;